ESTATE OF RAMON CLIFFORD MORENO

IBIA 86-51 Decided December 19, 1986

Appeal from an order affirming original determination after reconsideration issued by Administrative Law Judge Vernon J. Rausch in Indian Probate IP TC 398R 84, IP TC 224R 84.

Reversed and remanded.

1. Indian Probate: Divorce: Generally--Indian Probate: Marriage: Generally

   If a person has entered into two marriages, a presumption arises in favor of the second marriage. The burden is upon the party attacking the validity of the second marriage to prove the first marriage had not been terminated by annulment, divorce, or death prior to the second marriage.

2. Indian Probate: Marriage: Generally

   A marriage cannot be presumed in the face of specific evidence to the contrary.

3. Indian Probate: Marriage: Generally

   The party attacking the continuity of a marriage bears the burden of proof.

APPEARANCES: Joyce J. Moreno Hart, pro se.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE LYNN

On July 10, 1986, the Board of Indian Appeals (Board) received a notice of appeal from Joyce J. Moreno Hart (appellant). Appellant sought review of a June 30, 1986, order affirming original determination after reconsideration issued in the estate of Ramon Clifford Moreno (decedent) by Administrative Law Judge Vernon J. Rausch. For the reasons discussed below, the Board reverses that order and remands this case for further action consistent with this opinion.

Background

Decedent, an unallotted Saginaw Chippewa Indian, was born on October 17, 1936, and died intestate in San Francisco, California, on May 25, 1981.

Because the interested parties to this estate lived in Michigan and California, Judge Rausch sent each person a questionnaire concerning decedent's family relationships. The responses to the questionnaires were introduced at the July 18, 1984, hearing to probate decedent's trust estate.

The evidence showed that decedent married appellant on December 25, 1955, and had one child, Debra Susan Moreno, with her. Decedent and appellant separated sometime in or around 1958.

Decedent moved to California, where he began living with Lucille Correa or Rodarte. He and Lucille had two children, Ray Anthony Moreno and Teresa Elizabeth Moreno. Decedent and Lucille separated about 1972.

Appellant began living with John Hart about 1959. The couple had five children, who are not interested parties in decedent's estate. Joyce and John were living together when decedent died.

Judge Rausch issued an order determining decedent's heirs on August 13, 1984. The Judge found that decedent's heirs were his three children, named supra. As to appellant, he stated at page 1 of his order:

> Decedent married Joyce Collins, a Saginaw Chippewa Indian, on 12/25/55, and was separated from her prior to 1959. While there is no actual proof of a divorce on file, each party established a new marital relationship and had children; therefore, Joyce Collins is estopped from claiming there was no divorce.

Appellant sought rehearing from that part of the decision finding she was not decedent's surviving spouse. Judge Rausch affirmed his original decision in an order dated June 30, 1986. After discussing the second relationships entered into by both decedent and appellant, the Judge concluded at pages 6-7:

> The actions of both the decedent and the Petitioner are indicative that they believed themselves to be divorced. The Petitioner herself stated in her letter [of] June 26, 1984 that she "thought that he might have gotten a divorce". This indicates her own mind-set or earlier belief that she and the decedent were in all probability divorced and could explain why she entered into her relationship with John Hart. The Petitioner asserts in her June 26th letter that she "... read where it said that he was unmarried at the time of his death. If this is true, then he was still married to me by law." That statement is totally inconsistent, unless one assumes that the Petitioner was referring to the fact that if he was not married to someone else and someone else was not asserting that they were a surviving spouse, then she was going to assert that she was still married to him. This is obviously a self-serving claim of convenience, and one which deserves little credence.

> The burden is on the Petitioner to prove that she was not divorced from the decedent in light of all the other circumstantial evidence that indicates in all probability there was a divorce. Even though that may have caused the Petitioner to prove a negative (i.e. that the divorce never happened) she still must do so. (Griggs v. Pullman, 40 S.W.2d 463, p. 464 [(Mo. 1931)]) Having failed in her proof, her petition must be denied.
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> Additionally, the principles of equity would estop the Petitioner from asserting the continuance of a legal marriage mainly because of her voluntary actions of living with another man for 25 years, using his last name, and then giving her five children by him his last name. Based on those principles as well, her petition must be denied.

Appellant's appeal to the Board from this order was received on July 10, 1986. Only appellant filed a brief on appeal.

Discussion and Conclusions

The only question before the Board is whether or not appellant was decedent's surviving spouse. The Judge found that appellant had not proven she was the surviving spouse.

[1] Judge Rausch placed the burden of proof on appellant because of the general legal principle presuming the validity of a second marriage. As stated in Griggs, supra, cited in the Judge's 1986 order:

> When a second marriage is shown, it is clothed with every presumption of validity. The law presumes innocence, not guilt; morality, not immorality; marriage, not concubinage. If the validity of the second marriage is attacked, the burden is on the attacking party to prove its invalidity, and if, in assuming this burden, which the law demands, it becomes necessary to prove a negative, he must do so. The presumption in favor of the validity of the second marriage is not to be lightly repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive. The invalidity of the second marriage cannot be found, unless the parties holding the burden of establishing it complete a chain of evidence which will aggressively exclude every indication or suggestion which might conceivably rescue the second marriage from invalidity.

The Board agrees with the general principle that if a person has entered into two marriages, a presumption arises in favor of the second marriage. The burden is upon the party attacking the validity of the second marriage to prove the first marriage had not been terminated by annulment, divorce, or death prior to the second marriage. See Estate of Phillip Tooisgah, 4 IBIA 189, 82 I.D. 541 (1975), dismissed, Tooisgah v. Kleppe, 418 F. Supp. 913 (W.D. Okla. 1976).

[2] This presumption only arises, however, when the facts of a particular case establish a second marriage. The evidence in this case is that both appellant and Lucille stated their post-1958 relationships were not marriages. Even Lucille's children stated their parents were not married. The law cannot presume a marriage in the face of specific evidence to the contrary.

[3] Accordingly, the Judge improperly placed the burden of proof in this case on appellant. The burden of proving decedent and appellant were divorced should have been on the party attacking the continuity of their marriage.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Rausch's June 30, 1986, order is reversed and this case is remanded for further action consistent with this opinion.

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Kathryn A. Lynn
Acting Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge